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No. 722

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

WAREHOUSEMEN, TRANSFERMEN, CRAFTSMEN & HELPERS LOCAL NO. 542,
Petitioner,

v.

THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, ET AL.,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. RESPONDENT INCORRECTLY "RESTATES" THE CASE.

The Real Party in Interest, ALFRED M. LEWIS, INC., hereinafter referred to as "Respondent" for clarity, contends that "Petitioner's statement of the case is misleading and alleges the existence of facts totally unsupported by any evidence or even pleadings at any state of the lengthy litigation of this matter," and cites the decision of the California District Court of Appeal in *Alfred M. Lewis, Inc. and Rideout Produce Co.* v. *Warehousemen, etc. Local Union No. 542*, et al., 163 Cal. App.2d 771, 330 P.2d 53 (1958), as authority for this proposition.

The Petitioner invites reference to the District Court decision

in *Lewis*, reprinted as Appendix "B" to the Petition, filed herein, both in support of its Statement of the Case, and in opposition to the "Restatement" of Respondent.

For example, nowhere in the *Lewis* decision, or elsewhere in the record of this "lengthy litigation," can evidence be found of the general allegations of the second paragraph of Respondent's view of the case.

Nor is there support for Respondent's other major contentions. Neither the *Lewis* decision nor the record supports Respondent's charge that the term "semi-captive account" was found to be a "false front" by either trial court, of by the appellate court.

Respondent's contention with regard to the existence of the segments of the Union is subject to the same criticism.

Respondent's contentions with regard to the evidence of a diary kept by an employer defendant are curious in view of the fact that the motion to produce this document was one in which Petitioner joined; and his conclusions as to the significance of this evidence and the evidence recounted by him in the remaining paragraphs of his view of the case are peculiarly his own, unsupported by the *Lewis* decision or by the court in this record. The court's Memorandum Opinion is reproduced as Appendix "C" to the Petition filed herein.

II. RESPONDENT IGNORES THE TRUE BASES OF THIS COURT'S JURISDICTION:

In arguing against jurisdiction under 28 U.S.C. Section 1257, on which Petitioner relies, the Respondent utilizes only those authorities prior to the decision of this Court in *Hammerstein* v.

Superior Court, 341 U.S. 491 in 1951, and relied on by Petitioner for its holding that this Court does have certiorari jurisdiction from a denial of prohibition.

In confining itself to the law prior to 1951, Respondent likewise fails to recognize the application of the pragmatic standards of *Brown Shoe Co. v. United States*, 370 U.S. 294 at 306 (1962), to the instant case. (Petition, pp. 17-18.)

Nor does Respondent recognize this Court's two most recent decisions on the question of finality under section 1257: *Local No. 438, Construction and General Laborers Union et. al.* v. *Curry*, 371 U.S. 542, and *Mercantile National Bank at Dallas* v. *Langdeau, Receiver*, 371 U.S. 555.

Each of these cases is peculiarly applicable to the instant Petition. Thus, in *Curry* this Court rejected the contention of Respondents that the order appealed from, a temporary injunction, was not 'final' within the meaning of Section 1257, inasmuch as the state court's final judgment and permanent order remained to be issued. However, as this Court there said:

> "The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy . . . What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board." (at p.548)

As in *Curry*, the federal question raised by Petitioner in the California courts, and here, is whether the California courts had power to proceed with and determine the controversy; and the final judgment appealed from is that from the Superior Court

finally and—Petitioner contends—erroneously asserting its jurisdiction to deal with a controversy within the exclusive domain of the National Labor Relations Board, pursuant to *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959) and subsequent related decisions.

In *Langdeau*, the parties agreed that the state court order refusing a change of venue sought pursuant to a federal law urged by Petitioner, constituted the sole issue on appeal. This Court noted, at 558, that venue was a separate issue, not enmeshed with the merits of plaintiff's cause of action; and that it would best serve the policy of Section 1257 to consider venue now, rather than to subject both appellant and appellee to "long and complex litigation which may all be for naught," should its decision on the issue of venue be postponed.

The reference in *Langdeau* to "long and complex litigation" is particularly apposite. As Petitioner has noted (Petition, pp. 16-17), the state court determination of liability necessarily involves an adjudication of labor organization status, contrary to ruling of this Court in *Marine Engineers* v. *Interlake Steamship Company*, 370 U.S. 173 (1962), that such determination is for the National Labor Relations Board. Thus, a final judgment of damages immediately raises new and additional issues as to just what part or parts of that entity designated "Local Union No. 542" must respond in damages pursuant to such judgment. An appeal thereafter will therefore be additionally complicated by these new issues which can be avoided if the present review is granted.

For the additional reasons stated in both *Curry* and *Langdeau*, as well as those uncontroverted by Respondent, this Court has jurisdiction of the within Petition.

III. THE FEDERAL QUESTION HAS BEEN PRESERVED.

As Petitioner has related (Petition, pp. 7-11), the federal question has been urged and preserved at every stage of this litigation; and this fact is revealed by the most cursory examination of the record, or any part thereof. The California decision of *Gore* v. *Bingaman*, 20 Cal.2d 118, 124 P.2d 17 (1942), dealing with the so-called "law of the case" doctrine, can have no application to this dispute, where Respondent concedes "The only question not foreclosed by "law of the case" is the issue of jurisdiction." (Respondent's Brief, p.8)

Respondent appears to urge that Petitioner has waived the federal question of jurisdiction by urging pre-emption on retrial, rather than by "preserv[ing] the federal question of preemption by availing itself of its remedies in higher courts after the first appeal . . ." However, Respondent cites no authority for this novel theory; and he appears to forget that the court in *Lewis* denied Petitioner, as the appellee, an appeal on the issue of pre-emption, although such appeal was seriously urged; and thus forced Petitioner to pursue this issue on remand.

IV. THE PETITIONER'S DILEMMA: WHY THE PETITION SHOULD BE GRANTED.

Petitioner has urged a number of reasons why the writ should be granted, and in particular has urged the applicability of the decisions of this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 326 (1959) and such subsequent decisions as *Local 24 Teamsters* v. *Oliver*, 358 U.S. 283 (1959), 362 U.S. 605 (1960), and *Marine Engineers* v. *Interlake Steamship Company*, 370 U.S. 173 (1962).

Respondent declares these cases do not apply. Petitioner will not burden this Court with further exposition on these precise points: the contentions of both parties are now before the Court. Further discourse on the application of the pre-emption doctrine will be reserved, hopefully, for Petitioner's brief on the merits.

Petitioner here seeks only to correct the record as to Respondent's restatement of Petitioner's legal position; and to provide an illustration of the dilemma in which the present state of this proceeding places Petitioner.

Respondent contends that there is no meritorious legal issue in this petition, on the theory that any federal question decided by the California court must needs be

> "... in accord with *Allen-Bradley Co.* v. *Local Union No. 3 IBEW*, 325 U.S. 797 (1945) and *Gibony* v. *Empire Storage and Ice* [*Co.*], 336 U.S. 490 (1949). The state court decision at most could hold that a union is not immune from anti-trust laws where it combines with non-labor groups for a purpose lacking a legitimate labor objective." (Respondent, p.7)

Allen-Bradley and *Gibony* were of course decided prior to either *Garmon* decision or the development of the pre-emption doctrine. Further, the interdicted activities there found subject to antitrust regulation were concedely secondary boycotts, which are forbidden by Section 8(b) (4) of the Labor Management Relations Act, 1947 (Taft-Hartley), 29 U.S.C. Section 141. Section 303 of the Taft-Hartley Act provides, in addition, a federal remedy in damages for injuries sustained by secondary boycott activity.

In contrast, the state court has in the instant case decided that an uulawful intent to restrain trade may properly be *inferred* from the request of an autonomotus segment of a labor organization for higher wages from an employer with modern equipment, a modern operation, and a generally greater ability to pay, than it asked of employers with obsolescent equipment, obsolescent operations and a generally poor ability to pay. The state court has further held that such unlawful intent may be inferred from this request even though this course was decided upon by the interested segment alone, pursuant to majority vote, secret ballot and the full panoply of democratic processes.

It is submitted that, rather than the mild iteration of *Allen-Bradley* or *Giboney* suggested by Respondent, the decision of the state court below is a stern pronouncement which directs labor organizations that they bargain at their peril; and which will hold any union *in terrorem* at all stages of the bargaining process.

Under the rule established in the court below, it seemed evident that the only sure way for a labor organization to avoid the inference of "restraining trade" is to maintain uniformity of wage demands among employers. Yet, uniformity and negotiation are inconsistent principles; and wage negotiation presupposes consideration of the particular situation of the particular employer, including such factors as ability to pay, the number of employees required to produce the goods or services—i.e., those very factors considered by the responsible segment of Petitioner in the instant case.

The mutual duties of Employer and Union to bargain collectively are established in Sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act as amended, 29 U.S.C. Section 151.

These mutual obligations have been declared by a member of the National Labor Relations Board as being at the heart of the Act, fulfilling the Act's general purpose of putting the parties on an equal bargaining basis. See Fanning, "The Duty to Bargain in '1962," 14 Labor Law Journal 18, at 24.

It seems apparent that if the labor organization must bargain under the omnipresent threat of a charge of tortious conspiracy—with attendant double damages under state law—the Employer has been given a new and potent weapon. In this context, the positions of the parties are far from equal; with this excessive bargaining advantage, the purposes of the National Labor Relations Act can be effectively frustrated.

Thus it may be seen that the effect of the state court decision is twofold: first, to deny a labor organization the benefit of the National Labor Relations Act which endeavors to put the union on an equal footing with the employer; and second, to make the union vulnerable to state "conspiracy" doctrine by permitting inferences of antitrust violation to be drawn from traditional bargaining demands.

The full import of such a doctrine, if allowed to prevail, is difficult to envision. It has been some time since the Mayor's Court in Philadelphia found certain of its journeymen cordwainers guilty of an unlawful conspiracy to raise their wages. (See *Commonwealth* v. *Pullis*, 3 Commons & Gilmore, *A Documentary History of American Industrial Society*, 59-248 (1910).) The law of labor relations has experienced considerable development since the *Philadelphia Cordwainers Case* and, as expressed both in statute and judicial decision, has moved some distance from that 1808 decision. However, a sober regard for the neces-

sary implications of the Petitioner's situation reveals that if the decision of the court below is allowed to stand, that distance may be traversed with great rapidity.

V. CONCLUSION.

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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